

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 97-1510-CR
97-2208-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PATRICIA G. HASS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for La Crosse County: MICHAEL J. McALPINE, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Patricia Hass appeals her conviction for tax fraud and the denial of her motion for postconviction relief. She claims that the trial court gave a jury instruction which did not conform to the factual allegations in the

complaint, and that counsel was ineffective in a number of regards. We find no merit in any of Hass's contentions, and accordingly affirm.

In 1992, Hass entered an *Alford*¹ plea to one count of embezzlement. The State then proceeded against Hass on three additional counts of tax evasion relating to her 1988 and 1989 returns. Hass, who owned two separate businesses, claimed that she had actually reported the disputed income, but on the wrong schedule. Pursuant to a plea agreement, the State agreed to meet with Hass's accountant and to drop all charges if it was satisfied by supporting documentation that there was no unreported income. The State was not satisfied with the materials provided by the accountant, however, and a jury found Hass guilty on all three counts.

Jury Instruction.

Criminal defendants in Wisconsin are entitled "to demand the nature and cause of the accusation[s] against [them]." WIS. CONST. art. I, § 7; *see also* U.S. CONST. amend. VI. Hass contends that the trial court's instruction essentially deprived her of this constitutional due process right by allowing the jury to convict her of a crime other than that with which she was charged. We disagree.

First, contrary to the appellant's assumption, we consider the relevant charging document to be the information, rather than the criminal complaint. *See State v. Cheers*, 102 Wis.2d 367, 402-06, 306 N.W.2d 676, 692-94

¹ *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970), recognized the validity of a guilty plea, notwithstanding the defendant's continued protestation of actual innocence, where the court had before it substantial evidence of the defendant's guilt.

(1981). The information at issue here did not specify the source of the unreported income, and therefore did not vary in any way from the proof adduced at trial.

Moreover, we are not persuaded that an inaccurate specification of the missing source of income would have provided insufficient notice. A charging document satisfies constitutional notice requirements when it identifies all of the elements of the offense charged with sufficient clarity to allow the defendant to prepare a defense and provides protection against subsequent prosecution for the same offense. *Id.* at 405, 306 N.W.2d at 693.

Both the complaint and the information advised Hass that she was charged with three violations of § 71.83(2)(b), STATS., for rendering false income tax returns with the intent to evade assessment. In order to prove its case, the State necessarily had to prove an intentional discrepancy between Hass's gross income and the figures she reported to the Department of Revenue. Hass was thus placed on notice that the State would have to show *all* of her sources of income, regardless of any mention of a specific source of income in the complaint. Had she been acquitted, she could not have been subsequently charged with violating the same statute by failing to report income from some other source on the 1988 and 1989 returns. We conclude that the notice provided to Hass was not misleading, and the jury instruction given by the trial court conformed to the information.

Assistance of Counsel.

The test for ineffective assistance of counsel has two prongs: (1) a demonstration that counsel's performance was deficient, and (2) a demonstration that the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether counsel's actions were deficient

or prejudicial is a mixed question of law and fact. *Id.* at 698. The circuit court’s findings of fact will not be reversed, unless they are clearly erroneous. Section 805.17(2), STATS; *State v. Pitsch*, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985). However, whether counsel’s conduct violated the defendant’s right to effective assistance of counsel is a legal determination, which this court decides de novo. *Id.* at 634, 369 N.W.2d at 715.

To prove deficient performance, a defendant must establish that his or her counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. The defendant must overcome a strong presumption that his or her counsel acted reasonably within professional norms. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990). To satisfy the prejudice prong, the defendant usually must show that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687. We need not address both components of the test if the defendant fails to make a sufficient showing on one of them. *Id.* at 697.

1. Prior embezzlement conviction.

Hass first contends that trial counsel was ineffective for failing to collaterally challenge her embezzlement conviction under § 974.06, STATS., in order to preclude the State from using it to show intent and to impeach Hass’s credibility. The prior conviction had already been affirmed on appeal, however, and Hass had not raised on that appeal the issue which she now asserts as a basis

for collateral attack.² Aside from any substantive merit, a direct challenge to the embezzlement conviction would thus have had to overcome the procedural bar set forth in *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994). In addition, counsel testified that he did try to undermine the conviction indirectly with the defense theory that Hass was more of a bad bookkeeper than an embezzler. Under these circumstances, counsel's decision not to collaterally attack the prior conviction was well within an acceptable range of professional judgment.

2. *Miranda* warnings.

Hass next asserts that counsel should have challenged the use of several statements which she made during her 1990 audit, because she had not been informed of her constitutional right against self-incrimination under *Miranda v. Arizona*, 384 U.S. 436 (1966), prior to being questioned by DOR officials. No *Miranda* warnings were required, however, because Hass was not in custody when she was audited. Being the focus of an investigation into possible criminal activity does not constitute a custodial interrogation. *Beckwith v. United States*, 425 U.S. 341, 347 (1976). Therefore, counsel's decision not to challenge the admissibility of Hass's statements was sound, and did not constitute deficient performance.

3. *Plea agreement*.

² Hass claims that the embezzlement conviction was based on the false factual premise that she was an employee of the company from whom she had embezzled funds, when in actuality, she was a licensee, and was entitled to keep certain proceeds.

Hass also claims that trial counsel should have raised an alleged violation of the plea agreement based upon her accountant's testimony that the DOR agent gave only a cursory and half-hearted look at the materials the accountant provided. She theorizes that, if the auditor had looked more closely at her books, he would have understood that the income he expected to find attributed to one of her businesses had actually been attributed to another of her businesses.

Again, we emphasize that the tax evasion charges required a comparison of the combined income from both of Hass's businesses against her reported gross income. The State complied with the plea agreement when it met with Hass's accountant and reviewed the documents he provided. Nothing in the agreement required the State to accept the appellant's bookkeeping as satisfactory when the figures did not add up.

4. Incomplete audit.

Finally, Hass complains that counsel ineffectively declined to challenge the initial auditor's failure to examine the schedules relating to one of her businesses on her 1988 and 1989 tax returns. We conclude that counsel's decision not to pursue this line of defense was reasonable. The record shows that certain checks which the auditor was looking for were made out to another company, and that Hass admitted that she had kept the checks to compensate her for what she believed the company owed her. Once Hass told the auditor that she had not reported the checks as income, there was really no reason for the auditor to look for them on the other business schedules.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

